In my opinion ground (2) merits no consideration. It is clear from the judgment that the learned magistrate had decided the issue of actual possession without reference to the merits of either party's claim to the said premises.

I now revert to ground (1). Whilst admitting there was wrongful dispossession, it was suggested on the authority of *Bihari Lal* v. *Emperor* [1] that no forcible dispossession existed. It was held in that case that force contemplates the presence of the person using the force and of the person to whom the force is used. In my view that case does not afford any assistance to the appellant as it was decided under the provisions of section 522 of the Indian Criminal Procedure Code which corresponds to section 412 of our Criminal Procedure Code and reads:—

"(i) Whenever a person is convicted of an offence attended by criminal force and it appears to the court that by such force any person has been dispossessed of any immovable property, the court may, if it thinks fit, order such property to be restored to the possession of the person who has been dispossessed.

(ii) No such order shall prejudice any right or interest to or in such immovable property which any person may be able to establish in a civil suit".

It is necessary to review certain Indian decisions with regard to the construction of the provisions of section 145 of the Indian Criminal Procedure Code which corresponds to section 99 of our Criminal Procedure Code. The first case is *Sitanath Shaha Bhowmic* v. *Harvey.*[2] In that case one "H" was in possession of certain land. In his absence, a large body of men numbering about thirty who were armed with implements which might be used for offensive as well as for peaceful purposes, came upon the land in question and effectively dispossessed "H" by surrounding the land on all sides with a fence. The court held that to constitute forcibly dispossession:—

"No actual force or violence need be used. When the dispossession is effected by a show of criminal force sufficient to intimidate those in possession and to deter them from resistance, the latter are said to have been forcibly dispossessed".

The other case is that of *Amritlal N. Shah* v. *Nageswara Rao.*[3] The facts are that the petitioner who was in possession through his servants had been evicted by notice issued by a magistrate obtained on an incorrect representation. It was held that it is not in all cases that actual force should be used before there could be forcible dispossession under section 145(iv) of the Criminal Procedure Code:—

"Misrepresentation and improper threats besides there are sufficient to constitute forcible dispossession and there were these in this case".

Those cases were referred to with approval in *S. M. Dakhan* v. *Madholal.*[4] In that case the respondents entered the *nohra* illegally and forcibly and did not leave it despite requests and protests.

The result of these authorities is clear. In order to constitute forcible dispossession under section 99(iv)(a) of the Criminal Procedure Code it is not necessary that actual force or violence should have been used on any person. When the dispossession is effected by a show of criminal force sufficient to intimidate those in possession and to deter them from resistance, the latter are said to have been forcibly dispossessed. Misrepresentation and improper threats are also sufficient to constitute forcible dispossession.

In the present case the respondents came face to face with the appellant's sons who, in spite of repeated requests by them, refused them entry into the said premises. The respondents offered no resistance. Instead, they lodged two reports with the police and subsequently filed a complaint with the magistrate. In my view the reasonable inference to be gathered from the facts is that there was a show of force by the appellant's two sons which was sufficient to intimidate the respondents and deter them from re-taking possession. For these reasons I am of the opinion that the appeal ought to be dismissed. The reasons which I have given do not differ in substance from the ground which commended itself to the learned magistrate.

Appeal dismissed.

Solicitors: *Athi Nahappan & Co.; Singh Bros.*

ONG AH GOH v. KUAN KEH LAN & ORS.

[O.C.J. (Chang Min Tat J.) May 24, 1968]
[Ipoh — Civil Suit No. 68 of 1966]

Probate and Administration — Intestate having business in Malaya dying intestate in China — Domicile of intestate — Who are entitled to share in estate — Application of Chinese law in Malaya.

Chinese law — Succession — Intestate — Daughter's right to share in estate — Perak Order in Council No. 23 of 1893.

Succession — Intestate succession to estate of Chinese — Domicile of deceased — Order for administration — Executor de son tort — Limitation — Laches and acquiescence.

The deceased, whose domicile of origin was China, died intestate leaving a share in a partnership business. The deceased came to Malaya in 1913 and became a partner in a trading business in Seremban. In 1916, the deceased returned to his family house in China where his wife and children lived. He came back to Seremban a few months later with his eldest son. In 1917, the deceased fell ill and returned to China where he died in 1918. In 1924, the partners in the trading business equally divided the deceased share in the partnership property between his two sons.

The plaintiff, a daughter of the deceased, commenced proceedings in 1966, as administratrix of the estate of the deceased for the administration of the estate. She claimed *inter alia* for a declaration that the share in the partnership property which she alleged had fallen into the hands of her two brothers as a result of their inter-

meddling with the deceased's estate, were held in trust for the estate, and for the recovery of her due share in the estate of the deceased. The defendants, (the second son of the deceased, and the executors of the first son) alleged that the partnership property was given to them by the deceased during his lifetime as a gift *inter vivos* and denied that they had intermeddled with the deceased's estate and pleaded the defence of limitation, or alternatively, laches and acquiescence.

Held, dismissing the claim: (1) the onus was on the plaintiff to prove that the deceased had abandoned his domicile of origin in China and acquired a domicile of choice in Malaya. In the absence of any evidence that the deceased had intended to remove his entire family to Malaya, the presumption against a domicile of choice had not been rebutted and the domicile of the deceased at the time of his death was in China;

(2) by virtue of the promulgation of the Perak Order in Council No. 23 of 1893, and its extention to the other three States of the Federated Malay States, the law governing succession on an intestacy at the relevant time, was the same in China, Perak and Negri Sembilan;

(3) under such law, the entire estate of the deceased would devolve on his two sons. The plaintiff, a daughter, was not a beneficiary entitled to a distributive share in her father's estate;

(4) on the evidence, neither the first nor the second son of the deceased was an executor *de son tort*, and neither was chargeable with fraud;

(5) the defence of limitation failed as it was not possible to ascertain definitely the date the plaintiff first knew of the deceased's share in the partnership;

(6) in the circumstances of the case the plaintiff was guilty of laches and acquiescence;

(7) as the estate of the deceased was already in the hands of the deceased's two sons who were the sole beneficiaries, there was no justification for granting the order for administration

Cases referred to:—

(1) *Ramsay* v. *Liverpool Royal Infirmary* [1930] A.C. 588.

(2) *Platt* v. *Attorney-General of New South Wales* (1878), 3 App. Cas. 336 at p. 343.

(3) *Yap Tham Thai* v. *Low Hup Neo* (1919), 1 F.M.S.L.R. 383, C.A.

(4) *Hyod* v. *Guibert* (1865), L.R. 1 Q.B. 115 at p. 129.

(5) *Hartman* v. *Konig* (1933), 50 T.L.R. 114 at p. 117.

(6) *In re Tank of Oslo* [1940] 1 All E.R. 40 at p. 42.

(7) *The Reward* (1818), 2 Dods. 265;165 E.R. 1482.

(8) *Paull* v. *Simpson* (1846), 9 Q.B. 365; 115 E.R. 1313.

(9) *Hill* v. *Curtis* (1865), L.R. 1 Eq. 90.

(10) *Clegg* v. *Edmondson* (1857), 44 E.R. 593.

(11) *In re Jarvis* [1958] 2 All E.R. 336.

CIVIL SUIT.

N. T. Rajah for the plaintiff.

W. S. Davidson for the 1st, 3rd and 4th defendants.

Lim Kean Chye (*Ng Chee Kong* with him) for the 2nd defendant.

Cur. Adv. Vult.

Chang Min Tat J.: The plaintiff, as the administratrix of the estate of Ong See Yee, deceased, sued as such administratrix for (1) a declaration that the deceased died intestate leaving a share in the partnership business of Chop Hock Hoe & Co., in Malaya, (2) a declaration that Ong Seng Huat and Ong Seng Hong took over the deceased's said share and stood possessed of such share in trust for the said estate, (3) an order for accounts, (4) determination and payment to her of her share in the said estate, (5) in so far as might be necessary administration of the said estate, and (6) for such further or other consequential reliefs.

The deceased a person of Chinese nationality had died in China in or about the year 1918 after a sojourn in Malaya from 1913, interrupted by a return visit to China in or about 1916, leaving him surviving his wife Ko Lean Pin, a daughter Lian Bin Mooi born in or about 1893, the plaintiff, a daughter, born in or about 1902, Ong Seng Huat, his eldest son born in or about 1904 and the second defendant Ong Seng Hong born in or about 1906. Save for the elder son, Ong Seng Huat, whom he had brought to Malaya in 1916 and had left behind when he returned to China some time in 1917, all his next-of-kin were at the time of his death living in China. Ong Seng Huat died in Malaya in 1954 and the 1st, 3rd and 4th defendants are being sued as the executrix and executors, respectively, of his estate. The 2nd defendant the younger son, Ong Seng Hong, came to Malaya in or about 1922. The other daughter is still alive and living in China. The widow and the plaintiff came to Malaya in 1927 with the 1st defendant, wife of Ong Seng Huat. The widow lived until 1964 when she died at the ripe age of 90 years. While in Malaya, the deceased had entered into a partnership with others in Hock Hoe & Co., carrying on business in Seremban, and it is in respect of his share in the partnership business that the plaintiff, on 16th November, 1965, applied for a grant of letters of administration in the estate of her father. The grant of letters of administration was extracted on 20th January 1966. The writ of summons was sued out on 22nd February 1966.

The defence of all the defendants alleges that the deceased's share in the partnership business was given to them by the deceased during his lifetime as a gift *inter vivos* denying consequently that the deceased died possessed of any share in the partnership business and denying intermeddling with the deceased's estate as alleged or at all or fraud, and pleads limitation and/or laches and acquiescence.

Learned counsel for the plaintiff urges strongly that the action is for administration of the estate of an intestate which had remained

unadministered though the intestate had died some 40 years earlier and that in the absence of administration, the plaintiff's right as administratrix armed with a grant of letters of administration duly extracted could not be resisted. In brief, the estate must be administered and she, the person with the grant, was the person to do the administration. Her plain duty as the administratrix and her reason, or at least one of her reasons for bringing in this action, was to get in the estate and this she could do only by claiming from the estate of Ong Seng Huat deceased and from Ong Seng Hong, the 2nd defendant, the assets of the intestate's estate which had by reason of their intermeddling fallen into their hands. On the other hand, learned counsel for the defendants submit that the one real purpose of the plaintiff's action was to recover from the defendants what she felt was her due and proper share in the estate of her intestate father and which she considered she had been deprived of by her brothers. This is evident not only in her claim in her writ of summons and statement of claim but also in the argument that she could have no reasonable interest in the administration if she was not a beneficiary. It is therefore urged that if the plaintiff, her elder sister in China and her mother were not entitled to distributive shares in the estate of her father and if the two sons, Ong Seng Huat, deceased and Ong Seng Hong were the sole beneficiaries of the estate of the intestate, subject to certain rights of maintenance and dowry for the intestate's wife and daughters as would appear to be the law prevailing at the date of the death of the intestate, any order for administration by the plaintiff would have the net effect of the estate devolving on the two sons, as had factually been done without administration. No good purpose, it is submitted, would be achieved by the plaintiff for herself. Such an order would involve the taking of accounts and the tracing of assets which originated from an original $200 share in a business started with a total capital of $2,000 for a period of upwards of 40 years — a Herculean task which must appear as equivalent to the cleansing of the proverbial augean stables and which so obviously occasioned shudders of horror and dismay to the legal advisers of the defendants.

I confess I find the arguments of the defence very attractive. The crux of the plaintiff's claim as administratrix is succession to the estate of the intestate. If on the facts and on the law, the intestate's two sons were the sole beneficiaries, and together entitled to the entire assets of the estate of the intestate, then in the absence of any allegations that the wife of the intestate was not properly maintained or the reasonable provisions for the upbringing and marriage of the intestate's two daughters had not been made (claims, which if made, must necessarily be barred by limitation of time), to grant any order for administration to a daughter must, in the circumstances of this case, clearly be to indulge in excessive formalism or, to borrow a better term from another context, draconian severity. Strict legal administration of an estate, in respect of which the Government of the country had not lost any revenue by way of estate duty and very little by way of stamp duty, is, in my view, not a matter of right to be inexorably granted at the instance of the administrator. In any event, it is settled practice that a court will hesitate and refuse to make any order which must necessarily occasion grave inconveniences and heavy expenses without achieving any practicable or useful purpose. I am therefore of the opinion that the best as being the most convenient and proper approach to this action is to determine the question of succession to the estate of the intestate.

In any event, evidence was led on the domicile of the intestate, which together with the agreed statement of facts put in at the commencement of the trial makes the question of domicile an issue in the case.

The deceased had first come to Singapore in 1913 and for some time resided in Teluk Anson, in the State of Perak. There is no evidence how long he resided in Teluk Anson, but some time in the year 1915 he was invited to become and did become a partner in a trading business dealing in motor accessories and spare parts — with the partners of Chop Guan Hoe Hin of Singapore, Ong Cho Teck and Ong Tien Hee. The business traded under the name of Hock Hoe Co., and will be hereinafter referred to as the partnership. It commenced with a capital of $2,000 divided into 10 shares, of which the deceased held one share. The partnership was established in Seremban and as is usual in businesses of such a nature the deceased worked in the partnership business and lived on the premises.

In or about the year 1916, the deceased returned to China, to his native village of Kan-tau, Province of Fukien. The purpose of the deceased's return is not now known, but after a sojourn of a few months, he returned to Seremban. The date of his return is also uncertain, but it was agreed to be some time in 1916 or 1917. On this return trip he brought with him his eldest son, Ong Seng Huat. The other members of his family were left behind in the family house in Kan-tau. And on his return, the deceased and Ong Seng Huat stayed in the partnership premises in Seremban.

Some time in 1917, the deceased fell ill and went to China leaving behind in Seremban his son, Ong Seng Huat, then aged about 13 years. The deceased never returned to Malaya for he failed to recover in China and died in the family house and was buried in the cemetery in his native village.

The claim of the plaintiff being in respect of the succession to the assets of the deceased's estate, the issue of deceased's domicile at the time of his death is, in my view, the basic determinant. He had an undoubted domicile of origin in China, but on behalf of the plaintiff it is urged that he had at the time of his death acquired a domicile of choice in Malaya. At this late stage, it is not surprising that there is no direct evidence establishing both the *animus et factum* of an abandonment of the domicile of origin and the acquisition of a domicile of choice, and the court is asked to infer whether there was such a change from the known facts of the deceased's movements.

The onus of proving the acquisition of a domicile of choice in Malaya, as asserted by the plaintiff, is quite clearly on the plaintiff. The plaintiff has endeavoured to adduce evidence that the deceased had merely gone back to China on the last occasion for the purpose of seeking a cure to his illness and had every intention of returning to Malaya where he not only had a share in a partnership business and employment therein but had left a young son, then aged about 13 years, awaiting his return. She strenuously refutes any suggestion that the deceased had at all times the intention of returning to China to die and to be buried there. She says that when death came unexpectedly to her father in China, a coffin was then and only then bought for his burial; and brands as untrue the allegation of the defendants, or such of the defendants as were in a position to know that the deceased had some time before his death bought and stored in the family house a coffin, as is customary among those Chinese who wished to ensure the suitability of their last resting place, against the day of his death and interment. On the evidence, I have no doubt that when the deceased went to China on his last trip he was a sick man and went there to seek a cure. I have also no doubt that he had every intention of returning to Malaya, where he had left his eldest son, then a lad of tender years, but this is a totally different thing from saying that he intended to abandon his undoubted domicile of origin in China and take up a domicile of choice in Malaya. Together with the *factum* of residence in the new country, there must be an intention of permanently or indefinitely residing there and with the intention of abandoning his domicile of origin. In *Ramsay* v. *Liverpool Royal Infirmary*,[1] the testator, whose domicile of origin was Scotland, and who lived the last 35 years of his life in Liverpool in order to be near a brother and a sister, was nevertheless held, in the absence of independent evidence of an intention on his part to change his domicile, not to have abandoned his domicile of origin and acquired a domicile of choice. Lord Macmillan in his judgment in the House of Lords, at page 598, said:—

> "I doubt if there was ever a case in which the court has been asked to infer the acquisition of a domicile of choice from such slender evidence of intention as is relied on in this case."

Here the evidence is, with respect, even slenderer. Furthermore, as against the evidence that his elder son, Ong Seng Huat, was left in Malaya, in the care, not of strangers, but of relatives and clansmen, there was the undoubted evidence that when he came to Malaya, he had left behind him residing in the family house in his native village in China, his wife, his two daughters, including the plaintiff and a younger son, the 2nd defendant. In the words of Sir Barnes Peacock, delivering the judgment of the Privy Council in the case of *Platt* v. *Attorney-General of New South Wales* [2]:—

> "It is always material in determining what is a man's domicile to consider where his wife and children live and have their permanent place of residence, and where his establishment is kept up."

On the evidence, and especially in the absence of any evidence or suggestion that the deceased had intended to remove his entire family to Malaya when he recovered, if he should, from his illness, the family house in his native village in China must be the place to which it is to be presumed he would have gone if he had become incapacitated for his business or duties. In my view, not only had the plaintiff not discharged the burden of proving an acquisition by the deceased of a domicile of choice in Malaya, but the whole of the evidence points to the fact that the deceased was as so many of his companions of his age were, an oversea adventurer, who retained at all times the domicile of his origin. I find, therefore, that the presumption against a domicile of choice had not been rebutted and that the domicile of the deceased at the time of his death was in China.

Despite the fact that on the pleadings and on the facts adduced, the question of the deceased's domicile at the time of his death is one of the issues, and that consequently on a possible finding that the deceased retained at all times his domicile of origin in China, the question of succession to his estate would be determined by the law of China, such law was not pleaded by any of the defendants. Nor was any proof adduced of what this law was. It is, however, suggested that the law of China governing succession on intestacy forms part of the laws of Perak and by extension of the laws of Negri Sembilan and that it is the same as the law governing succession on an intestacy of a Chinese in Perak and Negri Sembilan so that nothing really turns on whether the deceased was domiciled in China, or in Perak or in Negri Sembilan.

Perak Order in Council No. 23 of 1893 promulgated on the 21st December, 1893, was in these words:—

> "Whereas it is expedient that certain national laws and customs of the Empire of China regarding marri-

age, adoption and inheritance should be recognised as law and enforced by the courts of the State of Perak in adjudicating upon such matters among the Chinese community, it is hereby enacted by His Highness the Sultan in Council as follows:—

1. The Chinese laws and customs hereinafter set out are hereby declared to be laws in the State of Perak and are to be observed by all courts of justice, arbitrators and other tribunals in adjudicating upon all or any of the matters therein referred to in respect of any cause, suit or other proceedings, either or both the parties to which is of Chinese nationality."

There followed a number of statements of Chinese laws and customs. Statement No. (XV) provided that the widow of an intestate had no right to share in the property, but the sons were bound to support her according to her station in life. Statement (XIX) provided that step-sons and married daughters were not entitled to any share in the property, but the daughters were entitled to due maintenance at the expense of the estate and the sons were bound to support them until the daughters marry and (this further provision was added by Order in Council No. 21 of 1895) to provide for them a suitable marriage and an adequate dowry when they arrived at a marriageable age.

Negri Sembilan, in which State the deceased resided after becoming a partner in Chop Hock Hoe and before he returned to China for the last time, had no legislation similar to the Perak Order in Council. Neither had Selangor any such enactment. There is also no reported case, as far as can be discovered, which applied the laws and customs of China as embodied in the Perak Order in Council to Negri Sembilan. But there is the case of *Yap Tham Thai* v. *Low Hup Neo*,[3] a decision of the Court of Appeal of the Federated Malay States, on appeal from the High Court at Kuala Lumpur, which held that where the intestate was a person of Chinese race domiciled in Selangor, the law governing the distribution of his estate was contained in the broad principles of Chinese family law embodied in the Perak Order in Council No. 23 of 1893 as modified by certain subsidiary rules of local custom. The Court of Appeal indeed agreed with the trial judge that the Perak Order in Council had been extended to the other 3 member States of the Federated Malay States though it over-ruled the trial judge's inference as to the effectiveness of the adoption of the appellant by the intestate. Innes Ag.C.J.C. said at page 390:—

"Having regard to all these considerations I find myself in complete agreement with the finding of the learned trial judge that the Supreme Court has in the States of Selangor, Negri Sembilan and Pahang given effect to the principles of the Perak Order in Council, if by the term 'principles' he meant those principles of customary Chinese family law recognized by the Order which are of such a fundamental character that they are universally adhered to by Chinese and not variable according to locality."

The Court of Appeal, in point of fact, found that the legislature of Selangor, Negri Sembilan and Pahang had indirectly sanctioned the adoption in these States of the principles of the Perak Order in Council by enacting in the Secretary for Chinese Affairs Enactment that the Secretary, in matters coming within the ambit of these principles "shall as far as local circumstances and justice and equity allow, pay regard to the known laws and customs of the Chinese." This decision of the Court of Appeal is, of course, binding on me.

The Perak Order in Council remained in force in Perak and, by extension, was applicable, *inter alia*, in Negri Sembilan until 1st January, 1930, when it was repealed by the Federated Malay States Distribution Enactment, No. 12 of 1929.

If the statements of Chinese law in the Perak Order in Council are accepted as Chinese law and custom, then despite the absence of any proof of Chinese law, I am on the authorities entitled to look at the Perak Order in Council for the foreign law on the matter of succession to the estate of a Chinese domiciled in China. If I am wrong in so assuming, then I must hold that in the absence of any proof of the foreign law, I must apply local law, following the decisions, *inter alia*, in *Hyod* v. *Guibert*,[4] *Hartman* v. *Konig*,[5] and *In re Tank of Oslo*.[6] And following the decision of *Yap Tham Thai's* case, *supra*, the local law is the law as embodied in the Perak Order in Council.

Either way, the effect is the same. Whether the deceased is domiciled in China, or in Perak, or in Negri Sembilan, whether the law with regard to succession of the intestate's estate is the law of China or the law as embodied in the Perak Order in Council, the plaintiff is not a beneficiary entitled to a distributive share in her father's estate. Nor was her mother, so that the plaintiff cannot even claim a derivative share through any entitlement under her mother's share in the estate. It is also fruitless to determine what assets of the intestate's estate consisted of immoveables and what of moveables as the right to succeed under the *lex domicilii* to the immoveable properties of the intestate and under the *lex loci* to the moveable assets does not belong to the plaintiff personally.

These circumstances appear to me to call for the application of the principle "*de minimis non curat lex*," and as justifying my refusal to order administration, I would adopt the observation of Sir W. Scott in *The Reward*,[7] that "the court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim *de minimis non curat lex*. Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh

little or nothing on the public interest, it might properly be overlooked." With or without an order for administration, the estate of the intestate devolve where it now lies, with the two sons who were the sole beneficiaries. I can therefore see no justification for granting the administration.

It now remains for me to deal with the other aspects of the defence. The facts as agreed are that after the death of the deceased, his partners continued the business in the same name of Hock Hoe & Co., and continued to retain the name of the deceased as a partner up to and including 1921. In 1922 and in 1923, his name was replaced by that of his son Ong Seng Huat. In 1924 his one-tenth share became divided equally between Ong Seng Huat and Ong Seng Hong, the 2nd defendant, and continued to be so divided until 1932. In 1933, the partnership was dissolved by an agreement made on the 31st October, 1933 between the surviving partners or their successors and Ong Seng Huat and the 2nd defendant *qua*-partners. Under this agreement, Ong Seng Huat and the 2nd defendant became entitled in satisfaction of their share in the partnership to the stock-in-trade, book debts and goodwill of the branch at Ipoh.

It is important to bear in mind that in 1918, the year of the death of the intestate, Ong Seng Huat was aged about 14 years and Ong Seng Hong about 12 years. In 1922, when Ong Seng Hong first came to Malaya, he was about 16 years old. In this year, Ong Seng Huat was given by the continuing partners his father's share in the partnership. He was then about 18 years old. In 1924, when their father's share or as recorded in the partnership's books, Ong Seng Huat's share in the partnership derived as a matter of fact from the intestate, was divided equally between Ong Seng Huat and the 2nd defendant, Ong Seng Huat was a young man of about 20 years and Ong Seng Hong a youth of about 18 years. But both were still under the age of majority. It is evident that between the death of the intestate and the initial transfer to Ong Seng Huat, the surviving partners had carried on with the partnership business among themselves and it was they who dealt with the intestate's share and that it was not until some four years after the death of the intestate that they vested the intestate's share in Ong Seng Huat. This and the subsequent division of the share between Ong Seng Huat and the 2nd defendant they did in the belief that the intestate's property properly devolved on his sons. Having regard to the law prevalent at that time, they were not wrong. What they omitted to do was to obtain a grant of letters of administration.

Now it is in evidence that in answer to the demands of the plaintiff after the death of their mother, the 2nd defendant had at all times denied that their father had left him any property in Malaya. What he wrote was in these words:—

> "I wish to state that my father died in China and left me no assets and properties in Malaya."

On the strength of this allegation the plaintiff charged the 2nd defendant with deliberately and fraudulently concealing from her the existence of the property left by their father. For myself I can detect no fraud. On the facts as agreed or as found, what the 2nd defendant alleged must be seen to be the literal truth. Their father had indeed left at his death a share in the partnership but this share or any part of it he did not leave to the 2nd defendant. He left it in the partnership. If what the 2nd defendant subsequently acquired was actually a half of the intestate's share, the fact remained that he obtained it from the continuing partners and Ong Seng Huat. It may be that the 2nd defendant was splitting hairs and morally, not quite correct but I for one do not consider him wrong to take this stand-point. What is, however, important to realise is that not only the continuing partners and Ong Seng Huat but the 2nd defendant also held at all times a genuine belief in the right of the sons to succeed to the entire assets of a Chinese intestate. Even if the belief turns out to be wrong, the holders of it cannot in my view, be charged with fraud so long as they genuinely and not unreasonably believe in it. But as the law stood at that time, they were not wrong in their belief.

On these facts, the first defence that the deceased's share in the partnership was given to Ong Seng Huat and the 2nd defendant by the intestate in 1917 before his death as a gift *inter vivos* was not persisted with. The second defence is that the plaintiff's action against the defendants on the basis that they are executors *de son tort* into whose hands had fallen by reason of their intermeddling the assets of the estate of the deceased was misconceived. The defendants deny that they were executors *de son tort* or had intermeddled with the assets and submit on the facts that the executors *de son tort* were the surviving partners of Hock Hoe & Co., as it was they who had taken possession of the property of the intestate and that in law the fact that they were handed the said property subsequently did not make them executors *de son tort*. Reliance was placed on the decision in *Paull* v. *Simpson*.[8]

In the case of *Paull* v. *Simpson, supra*, the lessee had died intestate during the term of the lease. His widow entered on the demised premises without taking administration and afterwards allowed her son-in-law with the assent of the landlord to take the premises. Thereafter the son-in-law paid the rents and continued to occupy the premises during the remainder of the term. It was held that the son-in-law could not be considered as the assignee in law of the

lease for though the widow might have been chargeable as executrix *de son tort*, he had not made himself executor *de son tort* by taking the premises from her.

On the evidence before me, I find therefore that neither Ong Seng Huat nor the 2nd defendant was an executor *de son tort* and that neither was chargeable with fraud.

It may be that, on the authority of *Hill* v. *Curtis*,[9] which follows the decision in *Paull* v. *Simpson*, *supra*, Ong Seng Huat and the 2nd defendant while not being liable as executors *de son tort* may be sued in equity. But on the pleadings no such claim was made. I therefore do not think it necessary to decide whether such an action lies or to consider whether in all the circumstances of the case, particularly having regard to the fact that the intestate's initial capital of $200 had over the years been converted, almost entirely by the skill and personal qualities not only of the continuing partners but also of the intestate's two sons, especially after 1932 when the latter took over the entire management of the Ipoh office of Hock Hoe & Co., the present assets are such as could be traced in equity or whether such a tracing is not so harsh and unconscionable that no court will allow it on proper equitable principles.

On the pleadings and on the evidence I find myself coming to the conclusion that the plaintiff's action must fail as being misconceived.

A further defence is limitation, alternatively laches and acquiescence. The plaintiff avers that she did not come to know of the existence of the intestate's share in the partnership until her mother told her of it at a dinner given in honour of her mother's 90th birthday in 1964. She strongly denies the evidence of the defence that she knew long before and showed such knowledge in discussions with her sister-in-law, the 1st defendant and with Ong Li Sin (D.W.5), her husband's quondam partner. Why her mother should have suddenly brought the matter up after, if I am to believe the plaintiff having kept quiet about it for nigh on 40 years has not been made clear to me. On the other hand, I find the alleged discussions with the 1st defendant and D.W.5 equally difficult to believe.

However, it seems to me that the truth can be discerned from a consideration of the circumstances in which the family lived. Now for ten years after the death of the intestate, until 1927 the plaintiff lived in China initially with her mother at the family house in Kan-tau and after her marriage in 1920 in a nearby village. Her other sister, older than she is by some years had previously married and presumably also lived outside the family house. From 1920 to 1922, her mother lived in this house with Ong Seng Hong, the 2nd defendant. After 1922 *i.e.* after Ong Seng Hong the 2nd defendant had come to Malaya, the mother lived in this house, it may be with some others, but definitely without any members of her immediate family. It might be that while her father lived, she did not concern herself with the question of the family income. But after her father's death and especially after 1922, when her mother lived in the family house apart from any of her children, and she was nearest to her, one would expect her to concern herself with providing for the mother or if she did not have to provide, to know how the mother was being provided for. Her two brothers were then in Malaya, both minors. Their livelihood in Malaya and their means of providing for their own existence as well as that of their mother in China must be a matter of knowledge to the plaintiff. Then in 1927 accompanied by her mother and her husband, she came to Malaya. Obviously this emigration was at the instance of her brothers. There is no evidence who paid for the passage but they came and lived in the premises of the partnership. She could not have not known that her father had some connections with the firm. She knew for a fact that her brothers were connected with the firm from childhood. Her brothers were able to obtain employment in the same firm. In these circumstances she must know the standing of her brothers in the partnership business, a standing which was not inconsiderable as it enabled them to obtain for her and her family such outstanding privileges and relating their standing to the fact that her brothers were first taken in when minors, she must reach the conclusion, if she did not know of it as a fact, that their position was derived from their father, and that this position could not in view of the privileges conferred be that of a mere employee. And as a Chinese, she must know that the business of Hock Hoe & Co., was as in the cases of so many other Chinese businesses a joint-venture or partnership. In any event, if she had the slightest degree of curiosity which is said to be common to her sex, she could have so easily discovered it. All she had to do was to ask just one question of any of the continuing partners, who were all either her kinsmen or clansmen. She in fact did ask this question, but she said it was in 1964. With respect to her, I am of the opinion that when she saw Ong Cho Teik in 1964, it was not for the purpose of ascertaining the assets of her father's estate but it was for the purpose of gathering the evidence for the action which she desired to bring but which she could not, as a Chinese, bring during the lifetime of her mother.

Her mother provides, in my view, the key. She obviously knew, as the plaintiff by her allegation admits, and must have known for a considerable time, if not from the beginning. She was in the habit of demanding money from the 2nd defendant and as the 1st defendant admitted in answer to a question from me "she (my mother-in-law) mentioned the $200 when

she was annoyed over the delay at my husband giving her money." It is obviously clear that she based her demands for money from the 2nd defendant on the sole ground that she had an inalienable right to it. Among a people that seeks to instal filial piety as the corner-stone of their family life, it is conceivable that whenever the mother of the plaintiff fretted over the delay in being given the money she wanted, she would let it be known in no uncertain terms that she was not dependent on her son but that what she asked for was hers by right as belonging to her husband and as the mother of his children. She might be mistaken as the plaintiff is as to her rights under the Chinese law of succession but the position remains that in her view, the property was hers, there for the taking and for the asking. And if she did express herself in so many words, it must be in the presence of the plaintiff with whom she lived for some periods over the years. In such circumstances I come to a finding that the plaintiff knew of the existence of her father's share long before 1964.

It is of course impossible to pin-point definitely the date of plaintiff's first knowing. This being so, the defence of limitation, to my mind, fails, but in all the circumstances of the case, the plaintiff is, in my view, guilty of such laches and acquiescence as on the authority, *inter alia*, of *Clegg* v. *Edmondson* [10] and *In re Jarvis* [11] to disentitle her, on this ground alone, to the reliefs she seeks from the court.

The plaintiff's claim is dismissed with costs.

Claim dismissed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Gibb & Co., Ng Chee Kong.*

WAN MOHAMED v. COLLECTOR, KOTA BAHRU

[A.C.J. (Wan Suleiman J.) May 30, 1968]
[Kota Bahru — Land Reference No. 1 of 1967]

Land Law — Acquisition of land — Valuation — Guide to valuation — Land owner to prove that award was inadequate.

The applicant was the owner of land 1 acre 165 *depas* in area which was acquired under the Land Acquisition Act, 1960. The Collector of Land Revenue made an award of $2,000 per acre as compensation. The valuation was based on the market value of neighbouring land in the same locality.

In a reference to the court under section 36 of the Land Acquisition Act, 1960, the land owner appealed against the award of the collector. He claimed that the trees should be valued separately from the land, and asked for $5,000 as compensation for the land and trees. It was admitted that he had purchased the land on August 13, 1962, for $800.

Held, confirming the award of the collector: (1) the purchase price of the land and the sales of similar land within the locality are the best guides for the valuation of land. Taking these factors into account, the collector had not erred in his assessment of the value of the land;

(2) the party claiming enhanced compensation is in the position of the plaintiff, and the burden is on him to produce evidence to show that the award is inadequate.

Cases referred to:—

(1) *In the matter of Land Acquisition Act; Munjit Khetsey*, I.L.R. 15 Bom. 282.

(2) *K. P. Frenchman* v. *Assistant Collector, Haveli*, A.I.R. 1922 Bom. 399.

(3) *Assistant Development Officer, Bombay* v. *Tayaballi Allibhoy Bohori*, A.I.R. 1933 Bom. 361.

LAND REFERENCE.

Ahmad Dzaiddin for the applicant.

Wan Ismail (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Wan Suleiman J.: This is a reference under section 36 of the Land Acquisition Act, 1960.

The land in question is Lot 1665 Mukim Kemubu Pangkal Kalong with a total area of 1 acre 445 *depas*, and the area acquired is 1 acre 165 *depas*.

Declaration in Form D of the intended acquisition was gazetted as G.N. No. 109/66 dated June 16, 1966 as required by section 8 of the Act, and the enquiry by the collector under section 12 was held on July 28, 1966. The collector made an award of $2,000 per acre so that the land owner recovered a total of $2,210 for the area acquired.

At the enquiry before the collector the land owner did not claim any specified amount of compensation, nor did he produce a valuer's report or call a valuer to give evidence on the value of the land. All that he did was to ask that the trees on the land should be given a separate valuation from the land itself. No reason was given for this failure to claim a specified sum as compensation, and I am of the opinion that under para. 4(b) of the First Schedule of the Act, the land owner shall not be awarded any amount in excess of the amount awarded by the collector.

In Form N, the application that an objection be referred to court, the land owner again did not claim any specific sum, but merely enlarged on what he had already said at the collector's enquiry about valuing the trees separately from the land itself. In Exhibit "A" annexed to Form N, the sum of $5,999 was given as the total sum of compensation expected for the trees alone. At the hearing of the reference, the land owner repeated his previous argument that the trees on the land should be given a separate valuation. However, he said that though he had asked for $5,999 as compensation for the trees alone at the enquiry before the collector, he now asked for $5,000 for the land and the trees together.

Under cross-examination he admitted that he had purchased the land on August 13, 1962 for